# APPENDIX

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

68-CV-1

RICHARD J. WOODWARD, NED P. CLYDE, JAMES L. SHERARD, RAYMOND LUNDGREN, DOUGLAS C. MOORHOUSE, and DAVID M. GREER, doing business as WOODWARD-CLYDE-SHERARD & ASSOCIATES, a partnership, *Plaintiffs*,

v.

D. H. OVERMYER CO. INC., a New York corporation, D. H. OVERMYER CO. INC., an Ohio corporation, THE SEAMEN'S BANK FOR SAVINGS IN THE CITY OF NEW YORK, QUICK-WAY EXCAVATORS, INC., NUCLEAR CORPORATION OF AMERICA, M. KRAMER & SONS, INC., THE PEOPLE OF THE STATE OF NEW YORK and the STATE TAX COMMISSION, *Defendants*.

Appearances:

Leslie A. Hynes
Attorney for Plaintiffs

William D. Powers
Of Counsel

Carter & Conboy
Attorneys for Defendants,
OVERMYER COMPANIES and
for Intervenor
GREEN & WHITE CONSTRUCTION COMPANY

John Cebula
Edward M. Connery
Russell Morton Brown
Brown, Goodpasture & Block
Of Counsel

James T. Foley, D. J.

## Memorandum-Decision and Order

There is nothing extraordinary about this action. It is one for foreclosure of a mortgage on improved real property located in the County of Albany. It was commenced originally in the Supreme Court, Albany County. By petition of D. H. Overmyer Co. Inc., an Ohio corporation, hereinafter referred to as Overmyer Ohio for convenience, and D. H. Overmyer Co. Inc., a New York corporation, referred to as Overmyer New York, the action was removed to this District Court on diversity and sufficient monetary amount grounds. The relief sought in the complaint is the ordinary and customary relief sought under New York law and procedures in mortgage foreclosure actions.

The complaint alleges, with reference to a letter agreement dated February 21, 1967, accepted by Overmyer Ohio and the actual notes attached thereto as exhibits, that Overmyer Ohio, by its President and Treasurer executed and delivered to the plaintiffs, a professional engineering nartnership, thirteen serial promissory notes to be paid at different time intervals in amounts of $10,000.00 and $20,000.00 at 6% interest. Such acts were done and instruments executed to secure a payment claimed to be due plaintiffs for their services.

The allegations in the complaint charged that on May 23, 1967, as collateral security for $183,654.35, the amount then due on the promissory notes, five to thirteen inclusive, Defendant Overmyer New York executed and delivered to the plaintiffs the mortgage sought in this removed action to be foreclosed. A copy of this second mortgage is attached to the complaint as Exhibit "B". Thereafter, it is alleged that a $20,000.00 note due on September 20, 1967, was presented for payment and payment was refused, according to the Notice of Protest, Ex. "C". At the time the complaint was filed there was due on the notes and mortgage $123,654.35, with interest from February, 1967.

There is no dispute concerning the execution and authenticity of the documents above mentioned. There is dispute concerning the legal propriety of the place where the note was presented for payment and upon which the default in payment is based, with further contention that the payee had not endorsed the note and therefore the Bank of presentment was not authorized to demand payment of the particular note. It should be noted that this action, by stipulation of the attorneys for all parties who appeared, was dismissed with prejudice against The Seamen's Bank for Savings in the City of New York, the assignee of a substantial predecessor mortgage to the one in issue here, and also discontinued under the same terms against Quickway Excavators, Inc., the holder of a valid mechanic's lien assumedly perfected prior to the mortgage here in issue.

There are four motions at hand to decide. I shall describe them briefly in the order in which they shall be discussed herein; such order being based upon my determination and view as to the impact and effect the decision of one has in relationship to the others. The first motion is by defendant Overmyer Ohio and New York under Rule 12(b) of the F.R. Civ. Proc. to dismiss the complaint for failure to state a claim upon which relief can be granted. Of course, it is obvious, ruling in favor of the defendants Overmyer on this motion would end it all. The second motion is by the same defendants, Overmyer, to transfer this action to the United States District Court for Massachusetts under 28 U.S.C.A. 1404(a), for the convenience of parties and witnesses, and in the interests of justice. Again, decision for these defendants would unload the burdens of this litigation from this District Court to another. The third motion is one by a Green & White Construction Co. Inc., to intervene under F.R. Civ. Proc. 24 as a plaintiff in order to assert a counterclaim and cross-action as set forth in a proposed complaint against the plaintiff partnership. It is conceded in this motion that Green & White

Construction Co. Inc. is a corporation owned by the same stockholders as defendants here, Overmyer Ohio and New York. It should be noted at this stage—because it is a factor tending to breed confusion and complication—that Green & White, the applicant intervenor here, and Overmyer, New York, on or about February 20, 1967, prior to the execution of the mortgage in issue in this action on May 23, 1967, instituted an action in the United States District Court for Massachusetts against Goldberg-Zoino & Associates, Inc. and certain of the plaintiffs. The background in that action and its court disposition in Massachusetts I will attempt to detail and clarify later. The fourth motion again is usually dispositive of all problems and is in the form of a cross-motion by the plaintiffs for summary judgment under F.R. Civ. Proc. 56.

## I

The motion to dismiss the complaint, in my judgment, is groundless. It is based upon the contentions that the note in question, not paid on the due date, which triggered the foreclosure, was not presented at the proper designated place and inasmuch as the payee had not endorsed it there was no authority in the bank of presentment to demand its payment. It is settled and elementary law that in consideration of a motion to dismiss, the material allegations of a complaint are taken as admitted, the complaint is to be liberally construed in favor of the plaintiff, and the complaint should not be dismissed unless it appears no set of facts could be proved to support a claim entitling to relief. (Conly v. Gibson, 355 U.S. 41, 45-46; Jenkins v. McKeithen, 395 U.S. 411, 421-2). The motion to dismiss is denied and dismissed.

## II

The change of venue motion has a number of overwhelming factors against its grant. Under the N.Y. CPLR, Section 507, this action for foreclosure, removed to this

Court, had to be tried in the County of Albany, New York. Equally so, under 28 U.S.C.A. 1392(a), it is implied the action may be brought only in the United States District Court where the property is located. It is unquestionably an action local in its nature. (See 1 Moore's Fed. Prac. 2nd Ed., pgs. 1456-58; 1557-58).

It is doubtful that a transfer to the District Court of Massachusetts would be to a District Court where this foreclosure action might have been brought. (See 28 U.S.C.A. 1404(a); Hoffman v. Blaski, 363 U.S. 335, 341-2). Finally and decisively, the circumstance adverse to a change of venue is the lack of satisfactory demonstration that there are witnesses sufficiently identified who have important testimony to offer. (See Saraf & others v. Chatham Carpet Mills, Inc. (SDNY), 275 F. Supp. 951). The motion for change of venue is denied.

## III

As previously indicated, there is some complexity by reason of the Massachusetts court action that must be explained in the consideration of this motion for intervention. The background situation is that the plaintiffs, being professional engineers, entered into an agreement with Green & White, wholly owned by the Overmyer stockholders, to perform soil and foundation investigations throughout the country, in about 28 states, at a large number of sites where Green & White would erect warehouses for Overmyer and its affiliates. In the course of this work the plaintiffs, in other parts of the country, retained outside consultants to perform certain aspects of the investigations. The retainer we are interested in is the one with Goldberg-Zoino Associates, Inc., a Boston company, to perform soil and foundation investigations for certain sites in Framingham, Massachusetts. It is on this particular retainer and the work done by Goldberg-Zoino at Framingham only that the defendants, Overmyer

New York, and Green & White, based their claim in the Massachusetts District Court. The complaint there sought damages in the sum of $300,000.00; the gist of the claim is the plaintiffs were responsible for the alleged negligence and performance of the investigative work done at Framingham by Goldberg-Zoino in that the work was improperly delegated and carelessly supervised by the plaintiff partnership. Overmyer New York, in the same complaint, sought to enjoin the plaintiffs from foreclosing the mortgage involved in this action. It is admitted the complaint of the intervernor, Green & White, filed in Massachusetts, is substantially identical to the one sought to be accepted here as an intervening cross-action.

In the Massachusetts District Court there have been motions filed and decided. The final result was that the Green & White complaint based in negligence was allowed to stand against these plaintiffs after a motion was granted by the District Judge to amend the complaint by adding as named defendants other partners of the plaintiff partnership not named in the original complaint. That complaint is apparently pending and the issues therein open for decision in the Massachusetts District Court. The cause of action alleged in this Massachusetts action by Overmyer New York for injunction against this mortgage foreclosure was dismissed on the merits by the District Judge.

In my judgment, the question of intervention would be one of permissive grant. (F.R. Civ. Proc. 24(b)). From my review there is nothing evident to warrant the grant of intervention based upon grounds of harm or prejudice to any rights of redress Green & White may have for alleged negligence on the Framingham project. Such intervention, even if we did not have the solid reasons I find evident to grant the summary judgment motion, would undoubtedly make cloudy the issues of a straight foreclosure action. It is also difficult for me to

ascertain any common questions of law or fact in the divergent claims of foreclosure and negligence. (Kind v. Markham, (S. D. N. Y.), 7 F.R.D. 265). It is also of great importance, I believe, that the identical claim sought to be interposed by intervention here is pending in Massachusetts eligible for court review and decision there, in its favor if the intervenor is entitled to the relief sought. Such pending similar action is enough in itself to defeat the motion for intervention. (S. C. Johnson & Son, Inc. v. Boe, (D.C.E.D. Pa.), 187 F. Supp. 517; Cresta Blanca Wine Co. Inc. v. Eastern Wine Corp., 2 Cir., 143 F.2d 1012; Isbrandtsen Co. Inc. v. Kokoh Maru, et al, (S.D. N.Y.), 263 F. Supp. 784; 3B Moore's Red. Prac. pg. 392). The motion to intervene is denied.

## IV

Summary judgment is still a delicate proposition in the federal system. The reluctance of the past has diminished and the Court of Appeals, Second Circuit, advised that the summary procedure be applied in appropriate situations with "less reticence and more resoluteness." (American Manufacturing Mutual Insurance Co. Inc. v. American Broadcasting—Paramount Theatres, Inc., 2 Cir., (1967), 388 F.2d 272, 278; Dressler v. The MV Sandpiper, 2 Cir., (1964), 331 F.2d 130). I had sufficient fortitude years ago before the above writings. (See Vermont Structural v. Tatko Bros. (N.D.N.Y. 1955), 134 F. Supp. 4; aff'd. 2 Cir., 233 F.2d 9).

In my judgment, based upon an analysis of the record made on these motions, and particularly weighing the substance of the opposition affidavits offered to the summary judgment motion, the plaintiffs are clearly entitled to grant of their cross-motion for summary relief. (F. R. Civ. Proc. 56(e); 6 Moore's Fed. Prac. pg. 2803). If the affidavits in opposition were to be accepted as sufficient, I detect no genuine issue of material fact that would de-

feat the motion. (Community of Roquefort v. William Faehndrich, Inc., 2 Cir., (1962) 303 F.2d 494, 498).

The argument about the place of presentment for payment of the notes being wrong flies in the face of express letter agreement by the general counsel and secretary for the defendants Overmyer, who must be accepted as an officer clearly armed with authority, agreeing to this change of place. The other contentions that failure of endorsement in some undescribed way takes away the authority of the Bank to demand payment seem to me technical and frivolous. The old and new law of New York holds that it is not necessary to make presentation for payment or to give notice of dishonor to the maker of the note. (Ribac v. S & G Parts Manufacturing and Equipment Corp., 24 Misc. 2d 36, 37; In re Morrell, 38 Misc. 2d 518; Dunning v. Dunning, 300 N.Y., 341, 344). There is no genuine issue of material fact discernible to me and the plaintiffs are entitled to summary judgment for the relief demanded in their complaint as a matter of law.

The motions for dismissal, change of venue and intervention are herewith denied and dismissed without the necessity of further formal order. The cross-motion of the plaintiffs for summary judgment is granted. An order and proper judgment to such effect shall be prepared and submitted by the attorneys for the plaintiffs, if consented to by the attorneys for the defendants Overmyer, otherwise to be settled on five days' notice.

It is So Ordered.

/s/ James T. Foley
United States District Judge

Dated: November 20, 1969—Albany, N. Y.

**Memorandum-Decision and Order**

Since my decision of November 20, 1969, the important part of which granted summary judgment to the plaintiffs, a variety of motions thereafter have been filed in behalf of the Overmyer defendants related to such decision. Positions of Overmyer have resulted in an unusual need for settlement of orders and the judgment. (See Memorandum dated January 23, 1970).

It has happened again, and settlement is now necessary for the proper order that will evidence my decision of January 5, 1970, that simply reaffirmed the denial of a motion by Green & White Construction Co., Inc., a corporation concededly owned by the stockholders of Overmyer, to intervene. It would not seem there should be much difficulty in phrasing an order, agreeable or not, that would conform to this uncomplicated court ruling. Really, the order only needs to state that I again denied the motion to intervene; the reasons being set forth fully in my November 20th decision.

Proposed orders have been submitted. I will sign and return the one submitted in behalf of the plaintiffs and shall return it to the attorneys for the plaintiffs for conformance purposes. It shall be forwarded then to the Clerk of this Court at Utica, New York, for filing. The counter-proposed order submitted by the attorneys for Overmyer and Green & White Construction Co., Inc., is rejected as not in conformance with my decision of January 5, 1970. Rehearing was granted and such grant is contained in the plaintiffs order that is signed. The order of the defendants is unsigned and it and the supporting affidavit will be filed with the Clerk of this Court with this Memorandum-Decision for record purposes. By this ac-

tion it will not be necessary to await the formal settlement date of February 24, 1970, in Albany.

IT IS SO ORDERED.

Dated: February 20, 1970
Albany, New York

JAMES T. FOLEY
United States District Judge

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**Memorandum of Foley, D. J.**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Appearances:

Leslie A. Hynes, Attorney for Plaintiffs, William D. Powers, Of Counsel.

Carter & Conboy, Attorneys for Defendants, Overmyer Companies and for Intervenor, Green & White Construction Company, John Cebula, Edward M. Connery, Russell Morton Brown, Brown, Goodpasture & Block, Of Counsel.

*Memorandum*

JAMES T. FOLEY, D. J.

By decision dated November 20, 1969, four motions were decided in this action. Among them the cross-motion of the plaintiffs for summary judgment permitting mortgage foreclosure was granted. The direction concerning submission of the Order and Judgment of Foreclosure and Sales was to be settled upon notice if not agreed upon.

An Order and Judgment with separate Affidavit of Regularity was submitted by the attorneys for the plaintiffs. A Counter-Order was filed on behalf of the defendants, Overmyer, New York and Ohio. There was only one major

difference in the orders, and after correspondence and discussion it has been resolved.

The Order and Judgment submitted by the plaintiffs is now signed. The major change which I have made is the addition of the words "so sold" after the word "premises" on the fourth line of page 9. Honorable Abraham C. Goldstein, Attorney-at-Law, 5 State Street, Troy, New York, is appointed Referee in the Order with fee to be fixed for his services by this District Court. The plaintiffs, as requested, are awarded an additional allowance of $300.00 with actual costs and disbursements to be later adjudged. The Order and Judgment and Affidavit of Regularity have been marked by me as filed this date at Albany, New York. Such papers are herewith returned to William D. Powers, an attorney for the plaintiffs, for forwarding to W. Arthur Dwyer, Clerk, United States District Court, Federal Post Office Building, Utica, New York 13503.

The Counter-Proposed Order and Judgment submitted by Overmyer is mailed directly to the Clerk for filing and is unsigned.

*Order and Judgment of Foreclosure and Sale*

Dated: January 23, 1970
Albany, New York

JAMES T. FOLEY
United States District Judge

**Motion To Intervene as a Plaintiff**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Green & White Construction Co., Inc. move for leave to intervene as a Plaintiff in this action in order to assert the counter-claim and cross action against the Plaintiff partnership set forth in its proposed Complaint, a copy of which is hereto attached.

In support of this motion, Green & White Construction Co., Inc., set forth that it is a corporation owned by the same stockholders as are the original Defendants, D. H. Overmyer Co., Inc., an Ohio corporation and D. H. Overmyer Co., Inc., a New York corporation; that it has an interest in the transaction which is the subject of this suit as specifically and particularly set forth in the attached proposed Complaint, and it is so situated that disposition of this action without this intervention will, or may as a practical matter, impair or destroy its ability to protect that interest, because the applicant's interest cannot be adequately represented by existing parties.

In further support of this motion, reference is made to Rule 24 of the Federal Rules of Civil Procedure as amended in 1966.

GREEN & WHITE CONSTRUCTION CO., INC.

By: EDMUND M. CONNERY
Edmund M. Connery
General Counsel

RUSSELL MORTON BROWN
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JOHN CEBULA, ESQ.
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74 Chapel Street
Albany, New York

**Complaint of Intervenor Green & White Construction Co., Inc., Annexed to Motion**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Intervenor, Green & White Construction Co., Inc., (hereinafter "Green & White"), a Delaware corporation with principal place of business in the City of New York, brings this cross-action and counterclaim to recover damages of approximately $300,000 caused by negligence of plaintiffs, herein called "Woodward-Clyde," failures, omissions, errors, misfeasance and non-performance of professional obligations in connection with the examination and use of a warehouse site at Framingham, Massachusetts.

1. Cross-plaintiff intervenor, Green & White, is a Delaware corporation having its principal place of business at 201 East 42nd Street, New York, N. Y.

2. In April, 1965, Green & White engaged Woodward-Clyde as professional engineers, holding themselves out as experts, to make borings and subsurface studies, and furnish a report on the soil conditions, and suitability for use in construction, of an area on New York Avenue, Framington, Massachusetts, designated by intervenor Green & White as sites Nos. 6 and 7. This area comprised some 14½ acres of land, which said plaintiffs well knew was under consideration for purchase as the location for two concrete warehouse buildings together with appurtenant facilities, loading docks, driveways and railroad sidings.

3. Said plaintiffs well knew that the specific reason for their being engaged was to report as to (1) whether or not the land was geologically suitable for the proposed construction program, and (2) if so, what preliminary site preparation measures would be required before construction could begin. In this connection Green & White

had previously retained said plaintiffs, Woodward-Clyde, to make numerous similar studies and reports in other parts of the country; and said plaintiffs had, in fact, become and were thoroughly familiar with the requirements of the intervenor Green & White.

4. Plaintiffs, Woodward-Clyde, have offices in various cities of the United States, and they hold themselves out as being specially qualified as professional engineers to study, analyze, report and advise on all problems relating to soil mechanics, foundations, and related problems. Intervenor, Green & White, knew of such purported qualifications and holding out by said plaintiffs, Woodward-Clyde, and placed special reliance upon, and confidence in, such representations, all to its damage and detriment as herein set forth.

5. Notwithstanding the personal and professional nature of the engagement undertaken by said plaintiffs, Woodward-Clyde, and the reliance upon them by intervenor Green & White which said plaintiffs well know, yet the said plaintiffs did nothing at all in person to apply their own individual professional knowledge and skills. On the contrary and without prior knowledge, permission or authority from intervenor Green & White, they employed as their agents to make the required study certain persons, Goldberg and Zoino, theretofore wholly unknown to Green & White.

(a) Intervenor Green & White is informed and believes, and so avers, that the plaintiffs, Woodward-Clyde, never did personally examine the Framingham site as they had contracted to do, nor did they independently make any study and analysis of that site, but on the contrary, wholly and completely accepted the report of their agents, said Goldberg and Zoino, without independent study, verification, or evaluation.

(b) Said agents, Goldberg and Zoino, did not actually perform the task required with reasonable care, skill, and professional engineering ability, but on the contrary made a soil study of grossly inadequate character, negligently and recklessly basing so-called expert conclusions upon incomplete and insufficient data.

(c) Said plaintiffs, Woodward-Clyde, received and transmitted to intervenor, Green & White, a site study report and recommendations by their agents, said Goldberg and Zoino, with unlimited approval, showing the site was "geographically suitable" for use as a location for the proposed warehouse buildings, even though such conclusion was untrue and misleading in the absence of expenditure of several hundred thousand dollars to make it suitable by removal of great quantities of wet subsoil, swampy vegetation, water-retaining peat in large areas, and replacement of such material with dry sandy fill imported from other locations; in addition expensive and extensive blasting by dynamite operations were necessary to remove underground rock in part of the site.

6. Relying upon said unconditional report, and the submission thereof by the plaintiffs Woodward-Clyde, intervenor Green & White entered into a firm contract for the construction of two warehouse buildings on the site in question at a fixed price, including therein the sum of $30,000, which was reasonably calculated to provide for preparation of the site under the conditions outlined in the aforesaid soil report.

7. Notwithstanding said allowance, conditions were found which were wholly and completely different from those indicated in said report so submitted by plaintiffs, and intervenor Green & White has been required to ex-

pend sums exceeding $300,000 in utilizing the site for construction purposes.

8. Without authority, said Goldberg and Zoino, plaintiff's agents sent to the construction site employees who were not qualified by education or experience to take action in the program, and said employees were not given proper instructions as to their duties or responsibilities, but they arbitrarily and recklessly undertook to give directions to subcontractors, grossly and wantonly interfering with the proper management of the work.

(a) They caused very great movements of soil and dynamiting of rock far beyond what was necessary or required in the construction program.

(b) They directed filling of great areas with material purchased and brought from other locations even though adequate fill material was available without cost on the site.

(c) They caused the placing of fill material over unstable peat deposits, which intervenor Green & White has had to remove in order to utilize the site properly.

9. All of said operations were conducted negligently, without reasonable professional skill, investigation, planning, supervision, or thought on the part of Woodward-Clyde.

10. Plaintiffs, Woodward-Clyde, did not in any way give proper professional supervision or attention to the responsibilities they undertook; but wholly and completedly delegated them without notifying the intervenor Green & White, and made no personal inspection of the site as required by reasonable professional engineering practices and standards, as well as by their contract, but utterly failed to carry out a reasonable standard of care in the exercise of professional engineering practice.

11. The same averments are true as to the agents, Goldberg and Zoino, but who were not only professionally negligent, but who also actively intruded upon the construction program with affirmative action of a harmful and wrongful nature which greatly increased the expenses of construction.

12. All the said plaintiffs unlawfully, wrongfully, negligently and unprofessionally delegated their responsibilities to other persons who were not professionally qualified, to the very great damage of this intervenor and cross-plaintiff, Green & White.

13. Being unable to pay or finance payment of the very great losses caused by said professional negligence, this intervenor and cross-plaintiff, Green & White, was forced to call upon its affiliate, D. H. Overmyer Co., Inc., an Ohio corporation for support, and this call was answered by causing the defendant, D. H. Overmyer Co., Inc., a New York corporation, to execute and deliver to plaintiffs the mortgage upon which they now sue. Said excess costs and losses in said construction program caused this intervenor, Green & White, to exceed by far the contract cost of said Framingham warehouse buildings and this intervenor is and will be obligated to repay to D. H. Overmyer Co., Inc., of New York, and its affiliates, if this Court should render judgment in favor of plaintiffs herein.

Wherefore the intervenor and cross-plaintiff, Green & White, prays for judgment against plaintiffs jointly and severally in the sum of $300,000 as compensation for the excess costs which this intervenor and cross-plaintiff Green & White had to pay, and became obligated to pay, for construction of the said warehouse buildings due to the negligence, inattention, omissions, wrongful interference and other misconduct of plaintiffs and their agents, together with the costs of suit.

14. Plaintiffs, Woodward-Clyde, in the month of May 1967 were asserting a very large claim for professional services (including therein a claim for services with ref-

erence to the above-described site) against the business affiliates of the defendants D. H. Overmyer Co., Inc. Said claim had at one time exceeded $243,000. and had been reduced to approximately $183,000.

15. In order to secure payment to said plaintiffs and believing that the said claim was due and owing for professional services actually performed in good faith and with reasonable professional care and skill, the defendant D. H. Overmyer Co., Inc., a New York corporation, executed a mortgage upon certain real estate in the Town of Colonie, County of Albany, in the State of New York, containing some 6.776 acres with a valuable warehouse thereon, having an appraised value of approximately $1,000,000 and covered by a prior first mortgage originally in the amount of $700,000, held by the Marine Midland National Bank of Troy, New York. The mortgage given the said plaintiffs is dated May 23, 1967, and recorded in the public records of said County and State.

16. Since the original date of said mortgage, the defendant mortgagor, D. H. Overmyer Co., Inc., has paid the sum of $60,000 plus interest in monthly payments on the 20th of each month; and the plaintiffs, Woodward-Clyde, claim that there is still due and owing on account of said mortgage the sum of $123,654.35 with interest accruing at the rate of 6% per annum.

17. Because of the alleged failures, defaults, omissions and professional negligence of said plaintiffs Woodward-Clyde and their agents, Goldberg and Zoino, and sub-agents as set forth above, which were wholly unknown to this intervening cross-plaintiff, said mortgage was given by defendant, D. H. Overmyer Co., Inc., to the plaintiffs, Woodward-Clyde, to secure a debt which was not in good faith and conscience due and payable, but on the contrary there had been a material failure of consideration for the note upon which this suit is bottomed and the mortgage given to secure it. Plaintiffs at all times represented and insisted that all of their work

had been properly performed with all requisite professional care and skill, and this intervenor reasonably and in good faith believed that to be true, notwithstanding that said plaintiffs well knew, and in the exercise of reasonable care should have known, that the Framingham site in Massachusetts was not properly surveyed or analyzed and had been falsely and negligently reported to this intervening cross-plaintiff as suitable for construction.

Wherefore, this intervening cross-plaintiff prays the Court to hear and decide the issues in accord with law, and render judgment in favor of Green & White, intervenor, against plaintiffs in the sum of $300,000 and for interest and costs of suit, and such other and further relief as may be warranted.

DEMAND FOR JURY TRIAL

Intervening cross-plaintiff, Green & White Construction Co., Inc., demands trial by jury of all issues of fact in this case.

GREEN & WHITE CONSTRUCTION CO., INC.

By .....
Russell Morton Brown

*Of Counsel:*

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 800, 801 and 802—September Term, 1969.

(Argued May 11, 1970 Decided June 9, 1970.)

Docket Numbers 34606, 34748 and 34749

RICHARD J. WOODWARD, NED P. CLYDE, JAMES L. SHERARD, RAYMOND LUNDGREN, DOUGLAS C. MOORHOUSE, and DAVID M. GREER, doing business as Woodward-Clyde-Sherard & Associates, a partnership,

*Plaintiffs-Appellees,*

—against—

D. H. OVERMYER CO., INC., a New York corporation,
D. H. OVERMYER CO., INC., an Ohio Corporation,

*Defendants-Appellants.*

Before:

FRIENDLY and KAUFMAN, *Circuit Judges* and BRYAN, *District Judge.**

**Opinion**

Appeals from a summary judgment entered by the District Court for the Northern District of New York, James T. Foley, Chief Judge, in favor of plaintiffs in a mortgage foreclosure action. Affirmed.

JAMES H. REIDY, Esq. (Gerard L. Goettel, New Work, New York, of Counsel), *for Defendants-Appellants.*

WILLIAM D. POWERS, Esq. (Leslie A. Hynes, New York, New York, of Counsel), *for Plaintiffs-Appellee.*

FRIENDLY, *Circuit Judge:*

This action by six partners of Woodward-Clyde-Sherard & Associates (sometimes hereafter "the Woodward part-

* Of the Southern District of New York, sitting by designation.

ners") to foreclose a second mortgage on property in Albany County, N. Y., executed by D. H. Overmyer Co., Inc., a New York corporation (Overmyer N. Y.), in order to secure notes signed by D. H. Overmyer Co., Inc., an Ohio corporation (Overmyer Ohio), and for a deficiency judgment, has given rise to a number of procedural problems.

The most important is whether the action is properly in federal court at all. The complaint was filed in the Supreme Court of New York for Albany County, and Overmyer Ohio and Overmyer New York petitioned for removal. The petition alleged that "none of the individual parties plaintiff is a citizen of the State of New York or the State of Ohio but are all citizens of the State of California or of the State of New Jersey"; that Overmyer Ohio is an Ohio corporation with its principal place of business in New York; and that Overmyer New York is a New York corporation with its principal place of business in that state. The petition was bad under the second sentence of 28 U.S.C. § 1441(b), providing that an action not found on the existence of a federal question "shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." While the action should therefore have been remanded if the plaintiffs had moved for such relief,[1] no suggestion on this score was made until the Overmyer corporations brought the point to our attention. Nevertheless under the "strong" rule that federal jurisdiction may be challenged at any stage, even by the party who invoked it, see Wright, Federal Courts § 7 (1970)[2] we must consider the problem.

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[1] Since, under 28 U.S.C. § 1331(c), Overmyer Ohio is deemed a citizen of New York for the purpose of § 1441, there would have been no possibility of justifying the removal under § 1441(c).

[2] The quoted adjective comes, of course, from Chief Justice Erle's famous characterization, quoted in Pound, Mechanical Jurisprudence, 8 Colum. L. Rev. 605, 608 (1908), and III Pound, Juris-

The severity of this rule stimulated judicial ingenuity to avoid it with respect to the issue with which we are here concerned. In *Handley-Mack Co.* v. *Godchaux Sugar Co.*, 2 F.2d 435 (6 Cir. 1924), Judge Knappen drew a distinction between § 2 of the Act of March 3, 1875, 18 Stat. 470, authorizing removal, *inter alia*, of actions "in which there shall be a controversy between citizens of different States," which he deemed to be jurisdictional in the true sense, and the provision limiting removal in diversity cases to a defendant not a resident of the state where the action was brought. Drawing on *Baggs* v. *Martin*, 179 U.S. 206 (1900), he held that where only the latter provision was violated and the plaintiff made no timely request for remand, the situation could be considered to be as if the plaintiff had brought the action in the federal court and, if jurisdiction would have existed in that event, objection on the score of non-removability would be deemed waived. Although the historical argument was rather shaky,[3] the result was desirable and Judge L. Hand, writing also for Judge Swan

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prudence 511 (1959). Conformably with Pound's prediction that such rules ultimately lead to curative action, the American Law Institute has proposed legislation to limit this harsh doctrine. Study of the Division of Jurisdiction between State and Federal Courts § 1386.

[3] The 1875 statute allowed removal without restriction, at the instance of either plaintiff or defendant. But these sweeping provisions were soon superseded by the Act of March 3, 1887, 24 Stat. 552, as corrected by the Act of August 13, 1888, 25 Stat. 433, both of which limited removal to defendants. Section 2 of the 1888 statute broke removal into two categories. Actions presenting a federal question might be removed only "by the defendant or defendants therein, being non-residents of that State," subject to a provision with respect to separable controversies. This was carried forward in § 28 of the Judicial Code of 1911, 36 Stat. 1094. In other words, from 1888 until 1948 the provision limiting removal for diversity to a non-resident defendant was in the same sentence authorizing removal itself, and a rather sharp scalpel was needed to dissect out one part of the sentence as jurisdictional leave the other as not.

and Judge A. N. Hand, found Judge Knappen's opinion "conclusive." *Bailey* v. *Texas Co.*, 47 F.2d 153, 155 (2 Cir. 1931). We are quite content to follow our distinguished predecessors, especially since the two cases were cited in *American Fire & Casualty Co.* v. *Finn*, 341 U.S. 6, 16-17, n. 14 (1951), with what could be regarded as approval and certainly was not disapproval.

Not seriously disputing this, appellants question whether there would have been jurisdiction had the action been originally brought in a federal court. The only doubt arises from the fact that the Woodward partnership has its principal office in New York and is alleged to have been organized under New York law, whatever that may mean. Although New York permits partners to sue or be sued in the partnership name, CPLR § 1025, this does not alter the long-standing rule that, for purposes of diversity jurisdiction, the court looks to the citizenship of the partners, *Great Southern Fireproof Hotel Co.* v. *Jones*, 177 U.S. 449, 456 (1900); *A. D. S. Developers, Inc.* v. *Tucker*, 263 F. Supp. 986 (E.D. Pa. 1967); contrast *Colonial Realty Corp.* v. *Bache & Co.*, 358 F.2d 178, 183-84 (2 Cir. 1966), dealing with a limited partner. We thus uphold federal jurisdiction and must now recount the proceedings below.

Immediately upon the action being removed, defendants, on January 2, 1968, filed a motion to dismiss the complaint. This was based on a contention concerning improper presentment of the allegedly defaulted note of Overmyer Ohio, a contention so utterly trivial and unmeritorious as not to warrant statement here. Three weeks later they filed a motion for a change of venue to the District of Massachusetts. This motion, almost certainly ill-founded in a mortgage foreclosure action, see 1 Moore, Federal Practice ¶ 0.142 [2.-1] and cases there cited in n. 16, alleged that the notes in suit had been given for plaintiffs' performance of engineering services in many states; that after delivery of the notes and payment of some, defendants learned that

plaintiffs had "unwarrantably and negligently" delegated their duties to others; and that as a result defendants' affiliate, Green & White Construction Company, Inc., on whose behalf the notes had been given by Overmyer Ohio, had instituted an action to recover damages in the District of Massachusetts in which Overmyer New York had joined to seek an injunction against the mortgage foreclosure.

After submitting affidavits in opposition to both motions, plaintiffs, in June 1968, cross-moved for summary judgment. The moving affidavit recited that the Massachusetts action, brought by Green & White and Overmyer New York against Goldberg-Zoino & Associates, Inc., a Massachusetts corporation, and two of the Woodward partners, had been dismissed with respect to the latter on jurisdictional grounds. A supplemental affidavit later apprised the court that the judge in Massachusetts had allowed Green & White but not Overmyer New York to file an amended complaint naming all the Woodward partners. In October 1968 defendants responded with an affidavit of their general counsel again raising the presentment issue and mentioning the claim of professional misconduct in a conclusory fashion, as hereafter noted. At the same time Green & White moved for leave to intervene as a plaintiff; its proposed complaint asserted the same claim against the Woodward partners it had alleged in Massachusetts. All four motions were argued in November. A year later, on November 20, 1969, the court denied defendants' motions to dismiss the complaint and for change of venue and Green & White's motion to intervene, and granted plaintiffs' motion for summary judgment. The portion of the opinion relating to the last discussed only the argument about presentment and said nothing about the claim of professional negligence. The judge directed plaintiffs' attorneys to prepare an order which, unless consented to, should be settled on notice.

Defendants responded with a renewed motion, served December 18, 1969, this time made by them as well as by

Green & White, to allow the latter to intervene as a plaintiff in order to assert its claim against the plaintiffs and in the meanwhile to stay the summary judgment. Circumstances were alleged to have changed because of the discontinuance of the Massachusetts action due to inability to serve all the Woodward partners. In one of the moving affidavits, by the general counsel of the Overmyer corporations, we find the first inkling that this claim, still alleged to be vested in Green & White, and somehow passed to Overmyer Ohio. The affidavit asserted that in February, 1968, some eight months before the initial Green & White motion to intervene as a plaintiff, Overmyer Ohio had assumed all its liabilities "and in consideration therefor became entitled to all the claims and accounts receivable of said Green & White, liquidated and unliquidated"; that "in order to make said transfer effective" Green & White and Overmyer Ohio adopted resolutions transferring the claim against the Woodward partners to the latter;[4] and that "it is the purpose of this assignment to express the true ownership of this claim, and make possible its satisfaction by decision of this Court which has jurisdiction of the W-C-S partnership." Plaintiffs filed opposing papers and the judge denied the motion on January 5, 1970.

Somewhere along the line plaintiffs submitted an order of foreclosure and sale in the usual form. On January 14, 1970, defendants served a counter-proposed order with only a minor modification. The judge signed the plaintiffs' order on January 23.

The final chapter was a motion by the defendants and Green & White dated February 12, 1970, for a rehearing with respect to their renewed motion. This asked the judge to sign a new order that would allow the Overmyer defendants to file answers to the complaints containing counter-

[4] The affidavit did not give the dates of the resolutions or attach copies.

claims within ten days, and to apply for a stay of the judgment of foreclosure and sale within another ten. Instead the judge signed an order by which he simply granted rehearing and adhered to his previous decision. With that this tedious recital ends.

The case illustrates a difficulty that may arise when a defendant, as required by F.R. Civ. P. 12(b), moves under that rule before answer and plaintiff counters with a motion for summary judgment. The Overmyer corporations argue that entry of summary judgment against them deprived them of the right, conferred by F.R. Civ. P. 12(a), whereby if the court denies a 12(b) motion or postpones its disposition until a trial on the merits, the defendant may file a responsive pleading within ten days. They contend that if the judge had denied their motions promptly instead of holding them for disposition with the plaintiffs' summary judgment motion, they could have filed an answer containing the counterclaim for professional malpractice and should be allowed to do so even at this late stage.

We can conceive of a situation, e.g., where a defendant acquired a counterclaim after submission of a plaintiff's summary judgment motion, where a contention of this sort might have merit. But this is not such a case. Before defendants had even made their motion to dismiss they were aware of the claim of defective service rendered to Green & White. When plaintiffs moved for summary judgment, it was open to the Overmyer corporations to raise against this the point that because of plaintiffs' misconduct the consideration for the notes had failed, quite apart from any ruling the court might make on Green & White's motion to intervene for the purpose of seeking a recovery. Yet the only paper they submitted in answer to plaintiffs' motion was a short affidavit by their general counsel which, after attempting to deal with the presentment issue, set forth in a conclusory manner that it had been "officially brought" to his attention that the work for which the notes

had been given "was negligently, carelessly, unprofessionally, unskillfully performed and unlawfully delegated without authority or permission by said partnership to other persons unknown to Green & White Construction Company, Inc., for whom said engineering work was to be done."[5] This was so far from meeting the requirements of F.R. Civ. P. 56(e) that discussion or citation of authority would be supererogatory. Moreover the judge had every reason to suppose that on this issue the defendants were placing primary reliance on the claim which their affiliate, Green & White, sought to assert by its motion for leave to intervene,[6] although, as defendants now contend, Green & White had transferred the claim to Overmyer Ohio in February so that the affidavit in response to the summary judgment motion could also have brought Overmyer's potential counterclaim to the court's attention. Perhaps, despite all this, the judge might have allowed defendants to plead a counterclaim if they had done this within 10 days of his denial of their motion to dismiss on November 31, 1969. Instead they waited until December 18 to make a motion, returnable January 5, 1970, which was primarily a renewal of the intervention motion although, as stated, one of the moving affidavits intimated that Overmyer Ohio had been the real owner of the claim all along. Not until February 12, 1970, nearly three months after the denial of their Rule 12(b) motion, did defendants clearly indicate a desire to plead a counterclaim.

Defendants complain that they have never had a day in court on their claim of professional malpractice and that the statute of limitations may now bar them from having one. While this sort of contention inevitably strikes a responsive chord in the judicial ear, if ever there were a

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[5] A following paragraph was to the same effect.

[6] This motion was clearly for permissive intervention under F.R. Civ. P. 24(b) and denial was not an abuse of discretion.

case where a litigant's plight was of his own making, this is it. Bearing in mind the long delay to which plaintiffs have already been put, we think it clear that the interests of justice require affirmance of the judgment.

It is so ordered.

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**Rule 13—Rules of Civil Procedure**

COUNTERCLAIM AND CROSS-CLAIM

(a) *Compulsory Counterclaims.* A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

**McKinney's Consolidated Laws of New York.**

**Uniform Commercial Code**

§ 3—306. *Rights of One Not Holder in Due Course*

Unless he has the rights of a holder in due course any person takes the instrument subject to

(a) all valid claims to it on the part of any person; and

(b) all defenses of any party which would be available in an action on a simple contract; and

(c) the defenses of want or failure of consideration, non-performance of any condition precedent, non-de-

livery, or delivery for a special purpose (Section 3—408); and

(d) the defense that he or a person through whom he holds the instrument acquired it by theft, or that payment or satisfaction to such holder would be inconsistent with the terms of a restrictive indorsement. The claim of any third person to the instrument is not otherwise available as a defense to any party liable thereon unless the third person himself defends the action for such party. L.1962, c. 553, eff. Sept. 27, 1964.

§ 3-408. *Consideration*

Want or failure of consideration is a defense as against any person not having the rights of a holder in due course (Section 3—305), except that no consideration is necessary for an instrument or obligation thereon given in payment of or as security for an antecedent obligation of any kind. Nothing in this section shall be taken to displace any statute outside this Act under which a promise is enforceable notwithstanding lack or failure of consideration. Partial failure of consideration is a defense pro tanto whether or not the failure is in an ascertained or liquidated amount. L.1962, c. 553, eff. Sept. 27, 1964.